IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 582 OF 1994

The State of Maharashtra] .. Appellant

Vs

Parvez Framroze Farmarji,]
aged 65 yrs., Occ: Business,]
residing at 121, Maker Tower,]
Parade Road, Bombay - 400 005.] .. Respondent

Dr. F.R. Shaikh for the Appellant-State.

Mr. R.F. Lambay with E.R. Naik for the Respondent.

CORAM: S.S. PARKAR &
ANOOP V. MOHTA, JJ.

DATED: 13TH JANUARY, 2005

ORAL JUDGMENT : [Per Anoop V. Mohta, J.]

1. This is an Appeal filed by the State of Maharashtra under Section 378(1) of the Criminal Procedure Code (for short "Cr.P.C.") against the order of acquittal passed by the Court of Additional Sessions Judge, Pune, at Pune, in Criminal Appeal No. 380 of 1982 dated 15th June, 1994, whereby, the Appeal filed by the respondent herein - original accused was allowed and the order of conviction in the Regular Criminal Case No. 24 of 1990 passed by the Chief Judicial Magistrate,

Pune, dated 20th September, 1992, was set aside, whereby, the respondent was convicted under Section 409 of the Indian Penal Code (for short "IPC") and sentenced to suffer simple imprisonment for one day till the rising of the Court and to pay a fine of Rs.80,000/- and, in default, simple imprisonment for three months. It was further ordered by the Chief Judicial Magistrate that from the realised fine, if any, an amount of Rs.75,000/- to be paid to the complainant, as compensation.

2. Shirin, wife of Firoze Irani, who is the real sister-in-law of the respondent, lodged a complaint under Sections 405, 406 and 420 of the IPC against the respondent on 23rd July, 1988, and the same was registered as Crime No.197 of 1988. It was stated in the complaint that on 26th March, 1988, she learnt that the respondent had received US $ 50,000/- from The American Life Insurance Company, Dubai, U.A.E., being the Power of Attorney Holder, which was alleged to have been executed by the complainant. Respondent had also obtained signatures on various papers from her. The said amount was retained by the respondent and never submitted any accounts to the complainant. Therefore, the complainant had issued Notices dated 11th April, 1988, and 23rd May, 1988, and demanded the said amount

and its accounts. As there was no proper explanation and reply received, the complaint in question was filed.

3. The charges were framed initially under Section 406 of the IPC on 7th June, 1990, and alternative charges were also framed under Section 409 of the IPC on 23rd August, 1991. Additional charge under Section 420 of the IPC was also framed at the instance of the Public Prosecutor. The respondent-accused had denied the above charges.

4. The prosecution led evidence of the witnesses including that of the complainant (PW1) Mrs. Shirin Firoze Irani, (PW2) Jaywant Kale, the PSI and (PW3) V.G. Bhosale, another Police Officer who investigated the case further. No evidence was led by the respondent. The learned Magistrate, after considering the material placed on the record and the Written Statement submitted by the accused under Section 313 of the Criminal Procedure Code, read with the arguments advanced, by an order dated 20th September, 1992, convicted the respondent for committing the offence punishable under Section 409 of the IPC and acquitted him for the offence punishable under Section 420 of the IPC, as referred above.

5. Criminal Appeal No. 380 of the 1992 of the respondent was allowed by the impugned judgment and order dated 15th June, 1994, and, therefore, this Appeal by the appellant-State.

6. We have heard the learned counsel for the parties. We have also gone through the record in extenso, including the testimony of the complainant. We are of the view that the appellant-State has been unable to make out a case of perversity or illegality to such an extent so as to interfere with the findings given by the learned Sessions Judge while reversing the order of conviction passed by the Chief Judicial Magistrate, Pune. After considering the material on the record, according to us also, the order of acquittal, in the facts and circumstances of the case, is proper, correct and within the framework of law.

7. There is no dispute to the basic facts that on 2nd June 1979, complainant’s husband Firoze Irani met with an accident in Dubai and succumbed to the injuries. The dead body of the complainant’s husband was brought to Bombay by the respondent. The Power of Attorney was executed by the complainant, sometime in July 1979. There is no dispute that the original Power of Attorney was not exhibited. It is on the basis of the xerox copy

of the said Power of Attorney that all these basic observations have been made by the Courts below. The complainant had signed various papers, including papers relating to the furniture and the articles owned by her deceased husband. There is also no dispute to the fact that based on the said Power of Attorney, respondent had received, on 25th September, 1979, an amount of US $50,000/- from the Insurance Company towards the claim of the insurance of her deceased husband. Sometime in June-July 1987, the complainant had suspected and, therefore, after due correspondence with the American Insurance Company at Dubai, U.A.E., she came to know on 26th March, 1988, that the respondent had collected the said money and credited the said amount on 30th May, 1980, in the Joint Account of the complainant and the respondent in the Bank of India. The respondent alone was dealing with the said Account. It is also clear from the record that the complainant has not examined the person who had intimated her, in June-July 1987, about the insurance and the insurance money of her late husband. We have also noted that even though the complaint was filed for misuse of Power of Attorney and criminal breach of trust, for US $50,000/-, however, the complainant, as recorded by the Courts below, had received an amount of Rs.1,20,000/- and Rs.54,000/- towards maintenance @ Rs.1,500/- per month. There was

no mention about various other facts in the complaint. It is also part of the record that the complainant had never purchased any flat by paying consideration from her account. On the contrary, the record shows that the accused had made the payment of the said flats. In the year 1980, a flat in Thakkar Apartment was purchased and the same was sold by the complainant sometime in the year 1986 and the total consideration was deposited in her Account again. Another flat was purchased at Panchratna Apartment, Pune, in the year 1980 in the name of the complainant and the entire consideration was paid by the accused. The said flat was also sold and the amount was credited in the Bank Account of the complainant. The complainant, however, was living with the consent of the accused in the flat (Thakkar Apartment) owned by the accused. Therefore, on the date of filing of the complaint itself, the case of the complaint about misappropriation of US $50,000/- by the respondent was false and incorrect.

8. On the record, there is a sufficient material to suggest and, as conceded by the parties, that the main complaint was in respect of US $50,000/- only and not for other money, articles or furniture. There are admissions on the record to suggest that the accused had been helping the complainant by all means and looking

after her and her children since the death of the complainant's husband. The complainant had knowledge about the insurance money, As observed in paragraph 33 that the complainant had stated that while making the payment the accused had informed her about the claim of insurance money of her deceased husband.

9. Merely because there was no reply sent by the respondent to the Notices, that by itself cannot be the reason to accept the complaint, as filed by the complainant against the respondent. We have also noted in the Written Statement under Section 313 of the Cr.P.C. that the respondent, in fact, stated that the last notice was replied to by the respondent. However, there is nothing on the record to support the same as it was not exhibited. We have further noted from the Written Statement filed by the accused under Section 313 of the Cr.P.C., the details of the account given by the respondent. The relevant extract is as under:

> "The nomination was in favour of Feroze's wife as the children all sons were minors when my brother Feroze was in Dubai I had arranged for his three trips to India to meet his family. I had taken of flat on rent for him and his wife who was to join him. The said flat was well furnished with furniture brought on hire purchase which was eventually despatched to Bombay. The said flat and furniture was secured on the guarantee of Pars International. The total rent for the house

> flat The said flat and the furniture paid for the period of two years was approximately Rs.2,00,000/- equivalent to US $ 25,000/-. I also paid the dues of Pars International which included his withdrawals, air-passage on three occasions, body embalming and sundries to the tune of about US $ 10,000/-. The balance amount of US $15,000/- was brought to India after converting to Indian currency which was 1,20,000/-. This total account of the expenditure incurred in Dubai was given to the complainant in 1980 itself. My sister-in-law has not challenged the same till 1987.
>
> I say that the Power of Attorney was required as the complainant was unable to go to Dubai herself and wind up all the affairs (payment of debts, hire-purchase of furniture, flat rent etc.) of the deceased. I did all the winding up, settled all the dues and brought back balance amount and deposited in the Bank in the joint account with the complainant.
>
> I purchased flat for her, and myself paid cash amount from my own pocket and looked after the day to day maintenance and education of the children and the family. The complainant and her minor children had no income and depended on me. I had disclosed everything to her and spent more from my own pocket to see to their comforts. She never demanded at any time for any accounts or receipts as none is contemplated in such a family matters when relations are good."

10. We are therefore, of the view that this is not a case of "misappropriation of property" or "criminal breach of trust" as contemplated under Section 406 and 409 of the IPC. We cannot overlook the relationship between the parties. The complainant is the sister-in-law of the accused. The delay in lodging the complaint itself raises various doubts in the

complainant's case, specially in view of the specific statement made by the respondent in his Statement under Section 313 of the Cr.P.C. and that there was no serious dispute or challenge made about the money till 1987. There was nothing on the record further to show that the complainant had received the amount and consideration from time to time, without any objection and without enquiring the purpose of depositing the said amount regularly in her Account, or even otherwise. The flat was also purchased by the respondent in the name of the complainant. The same was also not accounted or objected to in any way by the complainant. The said property was subsequently sold and the consideration received was also credited in her Account. There is also material on the record to show that the complainant's son could not maintain the business and he had suffered losses in the business in Pune and thereafter, the complainant and her children started making hue and cry about the said money. Therefore, it appears that there was no complaint till 1987 as their relations were cordial till then.

11. The complainant, in her evidence, has also stated that sometime in the year 1988, a flat was purchased by the accused in the name of his daughter even though she had paid an amount of Rs.2,50,000/- by

draft in the name of wife of the accused for the same. However, the complainant was unable to prove this on the record by leading any evidence in support thereof. The complainant has also deposed that since the year 1979 to 1986, she did not ask the accused about the money brought by him for purchasing the flats, neither she enquired about the regular maintenance which she was receiving from Dubai and also about the amount of Rs.1,20,000/- which was credited in her Account. The silence of the complainant for more than 8 years also raises various doubts in the complainant's own case. In this background, it cannot be said that the accused failed to give account of US $50,000/- (Rs.4,00,000/- approx.). So far as PW2 and PW3 are concerned, being Police Officers, they could not collect and prove the basic ingredients of the offences, as contemplated under Section 406 of the IPC, specially in view of the fact that the complaint was lodged after a lapse of ten years from the date of the alleged transactions. The other relevant witnesses were not examined, including the Police Officer who had recorded the statement of the complainant. In the present case, the prosecution has admittedly not brought on the record, original Power of Attorney and could not prove then relevant and material documents, even though reliance was placed on the same. The case cannot be based only on the oral testimony of

the complainant, specially when there was suppression of material facts and long delay in initiating the proceedings in question. It cannot be overlooked that the respondent-accused was acquitted for the offence under Section 420 o the IPC. The prosecution, according to us, therefore, failed to prove beyond reasonable doubt, the criminal breach of trust, dishonest intention and misappropriation of money by the agent i.e. the respondent-accused in question.

12. The basic ingredients of Section 409 of the IPC, as laid down by the Apex Court in the following cases are also important. **AIR 1960, S.C., 889** [Jaikrishnadas Manohardas Desai & Anr. Vs. State of Bombay] and **1994, Cri.L.J., 1100 (SC)** [Jagat Narayan Vs. State of Bihar]. In the present case, the whole case revolves around the criminal breach of trust by the agent, who, as alleged, failed to give proper accounts of the money duly entrusted to him. The extract of paragraph 4 in Jaikrishnadas (supra) is reproduced as under:

> "The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the

> property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when; a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made."

. The Apex Court, in **AIR 1974, S.C., 290 [Superintendent and Remembrances of Legal Affairs, West Bengal Vs. Birendra Chandra Chakravarty]** observed that in a given case, such disputes are civil in nature and have to be decided between the parties accordingly. In the present case also, there was a long and intimate relation between the parties and there were numerous dealings between them till the date of the complaint in question. Therefore, it is difficult to adjudicate upon the complainant's, as well as, the prosecution's case, as contended. It has been held in **AIR 1977, S.C., 1766** [Sardar Singh Vs. State of Haryana] that mere failure or omission to return property by itself is not sufficient to cover the offence under Section 409 and 405 of the IPC in each and every case. The prosecution has to go further to prove criminal intention, dishonesty and conversion of his own use to attract Section 409 of the IPC.

13. In the present case, we are of the view that apart from delay in lodging the complaint, the complainant had suppressed the basic facts to justify and to support her complaint about misappropriation of US $50,000/- by the accused, as sought to be contended. It is apparent from the record itself that she had sold the two flats, which were purchased by the accused in her name by paying the consideration for the same from his own account and/or there is no dispute at any point of time that the consideration for those flats was paid by the complainant. There is no further dispute that she had received an amount of Rs.1,20,000/-. She had also regularly received maintenance of Rs.1,500/- per month from 1980 to 1983. The complainant, along with her children, was living at Mumbai and she had good cordial relations with the respondent till the date of filing of the complaint in the year 1988. As we have noted, even though there was no reply to the Notices issued by the complainant, that itself cannot be the reason to convict the accused and/or charge the accused under Section 409 of the IPC for misappropriation of money or for breach of trust. We have also noted the statement of the accused under Section 313 of the Cr.P.C. Even though that itself cannot be the reason to accept the case of the defence, still, in the facts and

circumstances of the case, the own admissions made by the complainant in her evidence and suppression of the material facts by itself supports the defence case. The cumulative effect of this is that it is difficult to accept the prosecution case or the complainant's case that accused was unable to account for the money entrusted to him and/or misappropriated the said money. It also cannot be said that the accused has given false accounts for the money entrusted to him as agent, over which he had dominion, as alleged. According to us, this is not a case where an inference of misappropriation of the money can be drawn as sought to be contended by the complainant.

14. In Jagat Narayan (supra), the Supreme Court has also given the benefit of doubt to the accused and, after extending the same principle, the conviction order under Section 409 of IPC was set aside. The Apex Court has also accepted that the defence of the appellant (accused therein) as a probable one and, given the benefit of doubt. In the present case also, in view of the above background and reasoning, we are decline to interfere with the order of acquittal passed by the learned Sessions Judge.

15. Before parting with this matter, it is necessary to observe and, as contended by Mr. Lambay, learned Advocate appearing for the accused-respondent, that the complainant herself has made a request in writing to the State of Maharashtra and to the respective departments, sometime in the year 2001 itself, to withdraw the Appeal in question. In the said letters, which were duly received by the concerned departments, she has stated that as their relations are cordial she is not interested in further prosecuting the said matter. In view of this and as we have also noted their cordial relationship and, looking to the age of the parties, ends of justice also require that the matter be settled between the parties for all the purposes. Therefore, the cumulative effect of all this is also material to dismiss the Appeal filed by the appellant- State of Maharashtra.

16. For the reasons recorded above, the order passed by the learned Sessions Judge, Pune, in Criminal Appeal No. 380 of 1992 is confirmed and the Appeal is dismissed.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]

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